No. 74-804

IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
DEC 26 1974
MICHAEL RODAK, JR., CLERK

ROBERT L. CROUSE
Petitioner.

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your petitioner, Robert L. Crouse, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this cause on October 29, 1974.

OPINION BELOW

The opinion of the Court of Appeals is reported in Fed. (2nd) . A copy of the opinion and judgment of the Court of Appeals is appended as Exhibit 1.

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered October 29, 1974, is invoked under the provisions of 28 U.S.C.A. Section 1254.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for Federal jurisdiction in the United States District Court was by virtue of an indictment returned against Petitioner by the Grand Jury charging Petitioner with violations of Section 1503, Title 18 of the United States Code and Section 1510 of Title 18 of the United States Code.

STATEMENT OF THE CASE

Petitioner was indicted in a three count indictment. The first count charged him with violation of Title 18, U. S. Code, Section 1503 by corruptly and with threats endeavoring to influence, intimidate and impede, Mary Lucas, a witness before a Federal Grand Jury by threatening her with bodily harm, said offense occurring on January 11, 1972. The second count charged a violation also of Title 18, U. S. Code, Section 1503, in the same manner, but concerning her testimony to be given before the Grand Jury on February 12, 1972, said offense having occurred on January 10, 1974. The third count charged the defendant with the violation of Title 18, U. S. Code, Section 1510, by intimidating and threatening and endeavoring to obstruct Mary Lucas from communicating information to agents of the Federal Bureau of Investigation, said offense occurring on January 19, 1974.

By Order entered the 14th day of March, 1974, Petitioner was adjudged guilty on all three counts, and was sentenced on the first count to three years imprisonment under Section 4208 (a) (2), to two years imprisonment on the second count under the same Section, both of said sentences of imprisonment to run concurrently, and on the

third count was placed upon probation for a period of five years, said probation to commence upon the completion of the sentences of imprisonment. Petitioner thereafter filed a Notice of Appeal to this Court.

Petitioner prior to the indictment in this case was a police officer of the City of Charleston, West Virginia, having served as such for a period of twenty-one years. During the majority of that time, he worked as a vice squad officer, investigating such crimes involving gambling, prostitution, narcotics, and thefts. Sometime in the year, 1966, Petitioner met Mary Lucas. At the time they met, both Petitioner was married and Lucas was married. They commenced seeing each other and their relationship became intimate. They saw each other intimately until January, 1970, when they broke up in an unfriendly manner.

The evidence taken in the trial of the case, over the objection of the defendant, concerned itself with many controversial events that occurred during the time that appellant and Lucas were seeing each other. It will be the position of the Petitioner in this Petition that such matters brought out in the evidence were improper, irrelevant, prejudicial, and inflamatory. In view of that evidence, we'll point out the matters falling in this category. During the time of their dating, Petitioner talked to prostitutes and had occasion to call a woman described as a "Madam" Donna Pistore, to arrange for friends to obtain dates with prostitutes. In the spring of 1966, Tim Holloran knew Mary Lucas and her husband Don. He had talked with them about their marital problems. The next day he talked with Petitioner, and Petitioner told Holloran not to call him bad names and that he, Petitioner, had Mary Lucas' home bugged. Petitioner threatened to call Holloran's wife and tell her that Holloran had molested Mary Lucas at her home. Petitioner told Tim Holloran that he, Petitioner, ran this town. Holloran told Petitioner that he had heard from some colored people that Petitioner "beat up black people and slapped people around". Petitioner told Holloran that he sometimes had to do this to get the right answers to questions. All of this evidence was objected to and placed the Petitioner's reputation into issue when the Petitioner

had not done so himself. It was nevertheless admitted for the position of going to motivation and intention to the charges contained in the indictment.

Mary Lucas testified about her relationship with Petitioner that during that time there had been many quarrels. In January, of 1970, they had a parting of the ways and on February 14, 1970, Petitioner came to her home and put a shot gun to her head, saying that he was going to kill her. She said that before February 14, 1970, Petitioner had: held a shot gun to her head; beat her; split her head open; and threatened to throw her off the bridge. While on direct examination, the Government brought these violent matters to the attention of the Jury, it was not until cross examination that she admitted that all of these physical abuses took place before February, 1970. Petitioner never physically abused her after that time. In addition, all of these facts occurred prior to the time any investigation involving Petitioner and before she had ever been a witness before the Federal Grand Jury. Lucas had also testified that she had seen Petitioner take pay-offs from gamblers and prostitutes. In addition, he had been involved in burglaries. On cross examination, it developed that the "pay-offs" from gamblers and prostitutes, involved the collection of money for the Chief of Police to defray expenses of a march of confidence that they held in Charleston, promoting our American system of government. On one occasion, before 1970, Lucas saw Petitioner reach down the front of a prostitute's dress to take money from her. All of this testimony of Lucas' concerned other offenses and the reputation of the Petitioner. It was not related in point of time or point of event to the charges in the indictment. Nevertheless, the Court permitted the testimony to show motivation and intention.

In 1970, Mary Lucas worked under the supervision of George Spruce, who was the Personnel Director of the Alcoholic Beverage Control Commission of the State of West Virginia. He testified that Petitioner had threatened him and his family and had told him that he would receive 13 black carnations because of his association with Mary Lucas. He further stated that Petitioner had asked him if

he knew how the mafia operated. These comments were made in an effort according to Mr. Spruce to get Mrs. Lucas fired. In addition, Petitioner threatened Spruce with telling his wife that Petitioner had a picture of Spruce and Lucas together in bed. All of these comments were interjected into the trial for purposes of showing Petitioner's bad character and had no probative value going towards the charges in the indictment.

An investigation commenced in June of 1971, and witnesses were subpoened in August of 1971, to appear before a Federal Grand Jury. The investigation involved interstate prostitution activities, gambling, and alleged police pay-offs. When the evidence was offered relating to the investigation, counsel for Petitioner offered a stipulation that a valid investigation had been in progress by a Federal Grand Jury of the Petitioner, Crouse, regarding federal crimes. The Government refused the offer of stipulation because they wanted to show all of the details of the investigation which would involve evidence of other unrelated crimes of this Petitioner. Such evidence as contained above, is an example of the type of evidence sought to be introduced by the Goverament and we submit seeking to show Petitioner's bad character and reputation when he had not put the same on issue. The description of the investigation as related in his testimony by F.B.I. agent, Meeks, is an example. "Robert Crouse and Peter Biagi, were police officers, who allegedly took pay-offs in money and sexual favors from the girls working for Donna Pistore in order that they not be arrested." The statement of agent Meeks accused the Petitioner of grievous conduct on the part of a police officer. Such evidence was not necessary to the Government's case in view of the offer of stipulation.

In July of 1970, Mary Lucas gave an affidavit to a newspaper reporter for the Charleston Gazette concerning Petitioner's activities. This affidavit along with other information ended up in the Department of Justice in Washington, D. C., which brought about the investigation in this case. On January 12, 1972, Mary Lucas was subpoenaed to testify before a Federal Grand Jury. She testified in that Grand Jury proceeding that the Petitioner

didn't "actually threaten her" before she appeared before that Grand Jury. No indictment was returned by said Grand Jury charging the Petitioner with an obstruction of justice. Obviously, from the testimony of the witnesses in this case, Mary Lucas and Petitioner, over a period of their relationship engaged in many threats each to the other and that she did not consider his statements to her, prior to her testimony on June 12, 1972, as constituting any threat. The investigation continued thereafter and agent Meeks first saw Mrs. Lucas in July of 1973. During the period from January 12, 1972, to July of 1973, Mary Lucas and Petitioner had seen each other occasionally and were friendly each to the other. Meeks, however, testified that during his investigation and in talking with different people, "some of them would not talk to me because they were afraid". Even though an objection was sustained to this statement and the Jury instructed to disregard it, the inference still remained with the Jury that Petitioner had frightened the people who were the subjects of interview. On January 8, 1974, Lucas again talked with agent Meeks and two days later she was confronted by the Petitioner on her way home from work. A conversation took place between these two people which is of course a subject of dispute in the evidence. It is likewise the subject of the second and third counts of the indictment. The ultimate threat upon which the Government predicates counts two and three was the alleged threat made by the Petitioner, that if she cooperated with the F.B.I. and testified before a Grand Jury, she would lose her job. Obviously, Lucas was used to this kind of language from the Petitioner since he had threatened her with her job on prior occasions.

The Government in this case, either through direct testimony from their witnesses or through cross examination of the defendant's witnesses, intentionally brought into the record and before the Jury, the bad character of the Petitioner and evidence of other crimes, when such evidence had no relation to the charges in the indictment and would not go to Petitioner's motivation or intention in making the alledged threats to Mrs. Lucas. We herein specify such evidence for this Court's consideration:

(1) The Petitioner held a shot gun to Mary Lucas' head and threatened to blow her brains out, this occurring in 1970.
(2) That he beat Mary Lucas constantly prior to February, 1970.
(3) That he tried to choke Mary Lucas and smother her prior to February, 1970.
(4) That he split her head open and threatened to throw her off the bridge before February, 1970.
(5) That he engaged in burglary.
(6) That before 1970, he attempted to steal money from a prostitute.
(7) That in 1970, he threatened George Spruce with 13 carnations and with the mafia.
(8) That in 1970, he threatened Spruce with a picture of Spruce and Mary Lucas in bed together.
(9) That he tried to get Mary Lucas fired by threatening Spruce and his family in 1970.
(10) That in 1968, he beat up black people and slapped people around.
(11) That in 1970, he committed an assault with a deadly weapon on Mary Lucas. That he committed breaking and entering of Mary Lucas' apartment, even though he had a key to her apartment.
(12) That he and a state policeman in 1968, went to the black part of town busting down doors.
(13) That he was suspended from the police force for malingering.
(14) That the Petitioner had two illegitimate children.
(15) Had Petitioner exhibit the size of his fist and then asked if it was necessary to point a riot gun at "poor little Mary Lucas".
(16) Asked Petitioner if it was necessary to strike a woman one-third his size, referring to incidents prior to 1970.
(17) Asked Petitioner if he found it necessary to hit people one-third his size with a hand bigger than her head. (referring to Mary Lucas, prior to 1970)
(18) That Petitioner belted some boys around because they called him a name, prior to 1970.

(19) That Petitioner was suspended from the police department for lying.

In the rebuttal case presented by the Government over the objection of the Petitioner, proof was offered that one of defendant's witnesses, a voluntary worker for the Civil Defense had told the Civil Defense Director a lie. This was offered to impeach the defense witness. When the witness had testified in defense, he was asked whether he lied to the Civil Denfense Director and he responded that he had not. Such evidence was a collateral attack upon a collateral matter and improper.

Additionally, the Petitioner was asked on cross examination, whether he had sexual intercourse with Regina Jefferson, a prostitute, he replied that he had not. On rebuttal, the Government obtained imunity for Jefferson and obtained her testimony that she had had intercourse by way of sodomy with Petitioner. This also was a collateral matter and clearly in rebuttal testimony, if it was offered to prove Petitioner's association with prostitutes. But the grievance does not end there because the Government obtained a response to a question from Jefferson that at one time she was told that she would find herself at the bottom of Kanawha River if she made any statement about her involvement with various people. It did not develop until the cross examination that this statement was not made by Petitioner, even though it was offered to leave that inference.

Again referring to the rebuttal testimony, the Government sought to prove Petitioner's bad reputation for truth and veracity. That offered the testimony of three police officers for this purpose. The witness Robinson testified that the Petitioner's reputation for truth and veracity was fair and based that reputation upon conversations he had with people who said that they did not like the Petitioner. The Trial Court struck his entire evidence. The second police officer based his testimony, that Petitioner's reputation for truth and veracity was bad, upon his personal knowledge that Petitioner had charged people with being drunk who were not drunk. The third person

based his testimony upon his conversations with one person who told him that Petitioner arrested a man for being drunk who wasn't. All of this testimony certainly went to the Petitioner's general reputation, when he had not put it on issue and not to his reputation for truth and veracity.

One other matter that needs mentioned. During the trial of the case, the Government attempted to prove that Petitioner had asked a friend, Hobart Booth, to intercede for him with Mary Lucas. The Government attempted to show that Hobart Booth told Mary Lucas not to give information to the F.B.I. concerning Petitioner. They asked Mary Lucas whether something happened on the 14th day of January, 1974, that reaffirmed her suspicions that she might lose her job based on the alleged threats of Petitioner. She testified that a man named Hobart Booth told her "don't talk to them". Again, in cross examination of Petitioner, the Government asked him if he had asked Booth to approach Mary Lucas and convince her not to talk with the F.B.I. Petitioner had obtained Booth's Grand Jury testimony in accordance with Jenks, and his testimony before the Grand Jury did not support the Government's contention as elicited from these witnesses. Petitioner attempted to obtain the presence of Booth for trial but was informed that he was in the hospital. Petitioner proffered the Grand Jury testimony of Booth and asked that it be read to the Jury to show the inconsistencies in the Lucas testimony. This being refused, Petitioner moved for a mistrial because of the Government's introducing into evidence facts that it knew were not true. All of this unavailing. Petitioner asked that the Grand Jury testimony be made a part of the record and it is exhibited in the appendix to this Petition.

QUESTION PRESENTED

FIRST: DID THE GOVERNMENT ESTABLISH THAT THERE WAS A VALID FEDERAL INVESTIGATION OF FEDERAL CRIMES?

SECOND: WAS THE EVIDENCE OF BAD CHARACTER OF PETITIONER NECESSARY TO THE GOVERNMENT TO PROVE ITS CASE?

THIRD: WAS PETITIONER DENIED A FAIR HEARING?

STATUTES INVOLVED

Involved herein is simply Title 18, Sections 1503 and 1510 of the United States Code, copies of which Statutes are appended as Appendix II.

ARGUMENT

REASONS FOR GRANTING THE WRIT

FIRST: DID THE GOVERNMENT ESTABLISH THAT THERE WAS A VALAD FEDERAL INVESTIGATION OF FEDERAL CRIMES?

One of the elements of the offense charged in all three counts of the indictment is an actual, existing investigation of possible violations of a Federal Criminal Statute. *United States v. Carzoli*, 447 Fed 2nd, 774. The only evidence in this case which asserts that there was an investigation was the testimony of the Assistant U. S. Attorney, Bergstrom, and F.B.I. Agent, T. A. Meek, Jr. Their statements in this regard were conclusions and were not specific in what way the investigation involved Federal Crimes. The Petitioner offered a stipulation in that regard, but it was refused by the Government.

The evidence reflects that at the time a Federal Grand Jury investigation was being conducted, there was also a State Grand Jury investigation in process involving the City Police Department, pay-offs and prostitution. No where in the evidence in this case can it be assumed that the investigation concerned Title 18, U. S. Code, Section 1952, being the interstate racketeering statute and Title 18, U. S. Code, Section 371, which is the Conspiracy Statute.

The evidence reflected that the Petitioner had accepted money from gamblers and sexual favors from prostitutes. All of these alleged pay-offs involved purely state offenses, and there being no evidence of interstate involvement of the Petitioner with interstate gaming or prostitution. The evidence further justifies this conclusion in that the witnesses who testified before a Federal Grand Jury or who were interrogated by F.B.I. Agents, were likewise witnesses who had been either summonsed to appear before State Grand Jury or who had been interviewed by State prosecuting officials concerning purely state offenses. The evidence is not clear that the alleged threats made upon these witnesses by the Petitioner were to impede the administration of justice in the Federal Courts concerning Federal crimes.

SECONL: WAS THE EVIDENCE OF BAD CHARACTER OF PETITIONER NECESSARY TO THE GOVERNMENT TO PROVE ITS CASE?

Throughout the record in this case, as set forth in the facts above, evidence of other unrelated crimes committed by the Petitioner and evidence of his bad character was interjected by the Government. While it is true that in an obstruction case the Government can show evidence of other crimes in an effort to prove motivation of the accused, such evidence must be balanced against the prohibition of introducing character of the accused into evidence when he has not made the same an issue.

The leading case in the area of character evidence is that of *Michelson v. United States*, 69 S. Ct., 213; 355 U. S. 469. In that case the Court said:

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a prohabi-defendant's evil character to establish a probability of his guilt. Not that the law invests the de-defendant's evil character to establish a probability of his guilt. Not that the law invests the defend-

> ant with a presumption of good character. . . . but it simply closes the whole matter of character, disposition and reputation on the prosecution's case in chief. The state may not show defendant's prior trouble with the law, specifically criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpertrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weight too much with the Jury and to so persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a bad charge.

The Court further held, however, that where the defendant puts his character into issue, then the state can show his bad character and this can be done through the use of rumors of prior criminal conduct. In *United States v. Brown*, 451 Fed 2d. 1231, the Government introduced into evidence, testimony that the defendant was on a list of persons known to the Sheriff's Department that were engaged in narcotics activities. The Court held that the inquiry did not warrant the introduction of heresay testimony that the defendant was on such a list. By elliciting this testimony, the Court in citing *Michelson, supra*, said:

> Thus, the Government successfully put in evidence testimony relating to general bad reputation or character when the defendant's had not, themselves, put their character in issue. This is impermissable.

The Court held the admission of such evidence as prejudicial error. Likened to that case is the evidence introduction in this case concerning Petitioner's "beating of blacks", "busting down doors", "having illegitimate children", etc. None of these instances recited in the facts above go towards motivation of the Petitioner to try to impede the witness, Mary Lucas, from testifying before a Federal Grand Jury or giving information and evidence to a Federal investigating officer.

The issue at hand has been discussed by this very Court

starting with *United States v. Smith*, 446 Fed. 2d. 200. This Court stated that evidence of the commission of some other offense is not admissable to show criminal propensities of the defendant. It is admissable where it tends to establish a common scheme, plan, system, or design, or where it tends to establish motive, knowledge, intent, or the absence of mistake or accident. The evidensory matters have concerned with do not fall into either category. But even if it did so fall within one or the other category, in *Smith* that Court further held:

> The decision in a particular case may be a difficult one, involving: balancing, on the one side, the actual need for the other crimes evidence in light of the issue and the other evidence available to the prosecution, the convincingness of the evidence that other crimes were committed and that the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to mastering hostility.

We submit that this evidence was not needed by the Government in its prosecution, that the proof was not clear of many of the proved other offenses and that the evidence was such that a Jury could not prevent themselves from hostility towards the accused.

Perhaps the most cited case in this Circuit is that of *United States v. Mastro Totaro*, 445 Fed 2d. 802. This Court stated in that opinion:

> Evidence of the commission of one crime is not admissable merely to prove the defendant a 'bad man' and therefore more likely to have committed the crime charged. . . . unless, if, in the process of proving an element of the crimes, such as intention, knowledge or absence of mistake, the testimony discloses other crimes involved no objection to the admission of such testimony.

In that case, the Court was convinced that there was a

sufficient strong thread connecting the challenged evidence to an element of the crime charged. But to what element of the crimes charged does evidence like threatening a person with thirteen carnations and the mafia, that he had beaten Mary Lucas in 1970, that he was suspended from the police force for malingering, that he belted some boys around for calling him a name, that he had two illegitimate children, etc., etc.

Apparently, the decision in Mastro Totaro became so useful to the Government and so mistakingly interpreted that the prosecution in this case felt it could run the course and introduce every evil act committed by the defendant whether it had relationship to the charge or not. The dissenting opinion of Judge Sobeloff in *United States v. Baldivid*, 465 Fed 2d. 1277, demonstrates the misconception of the opinion written by him in Mastro Totaro. Therein, he invokes the rule of *Michelson, supra* and criticizes the majority of the Court for accepting as admissable challenged testimony of prior offenses. He reminds us in that dissent:

> Always to be reminded is the general rules primary aim of protecting a defendant from undue prejudice and unfair surprise.

He says Further:

> Before such prejudicial evidence is to be placed before the jury, the District Court must not only decide whether the evidence of prior crimes is independently relevant, but also, whether, notwithstanding its relevancy, it is not unduly prejudicial and, moreover, is truly needed by the prosecution.

Evidence in this case concerning the investigation by the Federal authorities could have been stipulated by the Government. Such a stipulation was offered by the Petitioner. What more would there be a need to prove matters regarding the Petitioner's contact with prostitutes and gamblers. The real issue in this case was whether the Petitioner endeavored to impede Mary Lucas by threats or

intimidation from testifying before a Grand Jury or giving information to a Federal officer. A clear reading of the record will justify the conclusion that the jury lost all conception of the charge in the indictment since the major part of the evidence concerned itself with irrelevant information of other crimes and bad conduct of the Petitioner. The evidence involving the charge itself was brief and to the point. An issue was joined by reason of the denial of the Petitioner that he threatened the witness in any manner. He admitted knowledge of Mary Lucas' being a witness. What was the real purpose for introducing the other crimes evidence except to bring about hostility towards the Petitioner by the Jury. Judge Sobeloff says:

> Since the publication of Mastro Totaro, this frail precedent was apparently been given a vigorous workout by prosecuting attorneys who, in my view, have failed to take full cognizance of that opinion's limiting language and restricted scope.

See also the dissenting opinion of Judge Widener in *United States v. Woods*, 484 Fed 2d. 127. Other Circuits have likewise recognized the principle. Not concerning itself with proof of other crimes the Fifth Circuit in *Odon v. United States*, 277 Fed 2d. 853, held that where there is testimony of a highly prejudicial and otherwise irrelevant matter, the Court's admonishment to a jury to disregard such testimony is not sufficient to cure the error. Such evidence is so harmful that prejudicial error is presumed and the hostility of the jury cannot be overcome by an admonishment by the Court to disregard.

By reason of the continual introduction of bad character testimony, the Petitioner in this case was denied a fair trial and was denied further a trial on the issue joined upon the charge in the indictment. No longer was the charge important to the Government, but the Petitioner's reputation was.

DENIAL OF A FAIR TRAIL

During the trial, the prosecution attempted to prove that the defendant importuned one Hobart Booth to influence Mary Lucas, (the chief prosecution witness) not to talk to the F.B.I. about the defendant during the course of an official F.B.I. investigation and to threaten Lucas with the loss of her job if she did so. In fact, at one point, the prosecution listed defendant's contact with Booth and Booth's subsequent conversation with Lucas as part of an incriminatory sequence of events on a blackboard before the jury.

The shocking thing about this entire transaction is that Hobart Booth denied any such contact on the part of defendant in his Grand Jury testimony.

The prosecution engaged in a deliberate effort to deceive the Court and Jury as to the true state of evidence concerning Hobart Booth by insinuating the inference that defendant used Booth as an agent to threaten Mary Lucas with the loss of her job if she talked with the F.B.I. about defendant, all the while knowing the same to be false. We respectfully submit that such conduct on the part of the prosecution was reprehensible and violative of defendant's constitutional rights to a fair trial. The United States Supreme Court stated that:

> As long ago as *Mooney v. Hoolahan*, 294 U. S. 103; 55 S. Crt. 340; L. Ed. 791 (1935), this Court made clear that deliberate deception of a Court and jurors by the presentaion of known false evidence is incompatible with 'rudimentary demands of Justice'. This was reaffirmed in *Pyle v. Kansas*, 317 U. S. 213; 63 S. Crt. 167; 87 L. Ed. 214 (1942). In *Nepue v. Illinois*, 362 U. S. 264; 79 S. Ct. 1173; 3 L. Ed. 2d 1217 (1959), we said, 'the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Cigilo v. United States*, 92 S. Ct. 763 (1972).

We believe that it is clear that where such conduct occurs

on the part of the prosecution, it requires reversal even irrespective of the prosecution's good faith. *Napue v. Illinois, supra,* and certainly that where as here it appears to be a deliberate effort to deceive, a conviction should not be allowed to stand. *Miller v. Pate,* 386 U S. 1; 87 S. Ct. 785; 17 L. Ed. 2d 690; *Levin v. Clark,* 408 Fed 2d. 1209 (D.C. Cir. 1967); See, *Barbee v. Warden,* 331 Fed. 2d. 842 (4th Cir.); *United States v. Rispo,* 460 Fed 2d. 572 (2d. Cir. 1972).

Closely allied to the prosecutorial misconduct in the inferential use of the Hobart Booth meeting with defendant as theorized by the prosecution was the use by the prosecution of questions of witnesses, including defendant, calculated to attack defendant's character and to inflame the jury. There were many examples during the trial as contained in the record, e.g.: That the defendant had illegitimate children; that defendant abused blacks; that defendant told lies; that defendant had been abusive of the witness, Lucas, with particular reference to defendant's physical size; that defendant engaged in unnatural sex acts; and other examples almost too numerous to mention. The sum total of the prosecution's strategy was such as to completely assassinate the character of defendant and to so inflame and impassion the minds of the jurors that it was impossible for the Jury to see through the 'clutter' to the material evidence of the charged offenses Not only are we speaking here of the introduction of incompetent evidence, but of the very conduct and intent of the prosecution in its use. We respectfully submit that a conviction obtained through such means cannot be allowed to stand. *United States v. Rudolph*, 403 Fed 2d. 805 (6th Cir.).

CONCLUSION

Petitioner was convicted by a Jury on improper evidence which showed his bad character. The Jury did not convict him on the charges in the indictment, but convicted him on the basis of evidence of his bad character and his commission of other crimes which had no bearing or relation

to the crimes charged. The Government exceeded the bounds of propriety in attempting to show each and every evil act Petitioner had committed over some seven years period of time prior to the indictment. Petitioner, therefore, respectfully submits that this Petition for a Writ of Certiorari should be granted.

LEWIS, CICCARELLO, MASINTER & FRIEDBERG

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APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1470

United States of America, Appellee,
versus
Robert L. Crouse, Appellant.

Apeal from the United States District Court for the Southern District of West Virginia, at Charleston. Robert R. Merhige, Jr., District Judge.

Argued September 30, 1974. Decided October 29, 1974

Before Haynsworth, Chief Judge, Boreman, Senior Circuit Judge, and Widener, Circuit Judge.

Arthur T. Ciccarello (Lewis, Cicarello, Masinter and Friedberg and Allan H. Masinter on brief) for Appellant; James E. Roark, Special Attorney, United States Department of Justice, (John A. Field, III, United States Attorney, Wayne A. Rich, Jr., Assistant United States Attorney, and Thomas A. Crawford, Jr., Special Attorney, United States Department of Justice, on brief) for Appellee.

PER CURIAM:

A jury convicted Robert Crouse on two counts of obstructing justice by threatening a federal grand jury witness in violation of 18 U.S.C. §1503. It also convicted him of obstructing a federal criminal investigation in violation of 18 U.S.C. §1510. Upon consideration of the briefs, record and oral argument, we find no reversible error and affirm the judgment of the District Court.

AFFIRMED

APPENDIX II

Title 18 U.S.C. §1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being or having been such juror, or injures any such count of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. §1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator —

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-804

ROBERT L. CROUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition raises three questions: (1) Whether the evidence presented was sufficient to prove that threats by petitioner against a grand jury witness were made to impede a federal grand jury investigation; (2) whether the trial court erred in admitting evidence of other misconduct by petitioner; and (3) whether the prosecution inserted into the trial misleading evidence involving a friend of petitioner's.

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on one count of obstructing justice in January 1972 by threatening Mary F. Lucas (a federal grand jury witness) with death if she testified about petitioner, in violation of 18 U.S.C. 1503; one count of obstructing

justice in January 1974 by threatening Mrs. Lucas with the loss of her job if she testified against petitioner, also in violation of 18 U.S.C. 1503; and one count of obstructing justice in January 1974 by threatening Mrs. Lucas with the loss of her job if she continued to give the F.B.I. information concerning petitioner, in violation of 18 U.S.C. 1510. Petitioner received concurrent sentences of three years' and two years' imprisonment, respectively, on the 1503 counts; he was sentenced to five years' probation on the 1510 count, the period of probation to commence upon completion of his imprisonment. The court of appeals affirmed *per curiam*.

In June of 1971, the Pittsburgh Organized Crime and Racketeering Field Office of the Department of Justice initiated a grand jury investigation in Charleston, West Virginia, concerning interstate prostitution activities, violations of federal narcotics and gambling laws, and corruption within the Charleston Police Force (Tr. 18-19, 38-39).[1] Two of the principal subjects of the investigation were petitioner, as head of the Charleston Police Department's Vice Squad, and Donna Pistore, madame of a house of prostitution in Charleston (Tr. 27-28, 448). Among the grand jury witnesses was petitioner's former girl friend, Mrs. Mary F. Lucas, who testified before the grand jury on January 12, 1972 (Tr. 29-33, 42). A continuing F.B.I. investigation of prostitution and gambling in Charleston prompted a second grand jury appearance by Mrs. Lucas in January of 1974 (Tr. 55-56, 171-172).

On the Friday night preceding Mrs. Lucas' 1972 grand jury appearance, petitioner came to her home and tried to persuade her not to testify. When Mrs. Lucas refused

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[1] "Tr." refers to the trial transcript, which the government is lodging with the Court.

to see a lawyer named by petitioner, petitioner told her "that I didn't like living too well and that I might be dead sooner than I thought" (Tr. 82-84). After Mrs. Lucas had testified before the grand jury, petitioner called her several times at home to find out whether she had been asked during her testimony about Donna Pistore and about a certain robbery. He said, "Mary, if you send me to prison, I will kill you. And then I will kill myself" (Tr. 87).

In July of 1973, Agent T. A. Meek of the Federal Bureau of Investigation questioned Mrs. Lucas about petitioner and informed her that she might be called again before a grand jury (Tr. 158). On January 8, 1974, Agent Meek again interviewed Mrs. Lucas and again questioned her about petitioner (Tr. 165). The following day, January 9, petitioner heard about the January 8th interview. On January 10, while Mrs. Lucas was driving home with a girl friend, petitioner signaled to her from a police cruiser to stop. After petitioner persuaded Mrs. Lucas to get out of her car and speak with him privately, he questioned her about her recent conversation with the F.B.I. agent. Mrs. Lucas refused to repeat the conversation and expressed the hope that petitioner and his associates would be caught (Tr. 61, 90-92, 169-170). Petitioner said, "Mary, you know, if you testify I can make you lose your job. I happen to be a personal friend of Dick Barber's and Governor Moore's" (Tr. 91, 172).[2] When Mrs. Lucas re-entered her car, she was visibly upset; she explained to her girl friend, Connie Burford,

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[2]At the time, Mrs. Lucas was employed by the West Virginia Alcoholic Beverage Control Commission (Tr. 77).

that petitioner had threatened her with the loss of her job and that he would make good on the threat (Tr. 191). On January 16, 1974, Mrs. Lucas described to Agent Meek her January 10th encounter with petitioner, and on January 17, 1974, she again described the encounter in her second appearance before a federal grand jury (Tr. 171-172).[3] Shortly thereafter, petitioner was indicted and arrested on the instant charges (Tr. 177).

1. The evidence at trial amply showed that petitioner's threats to Mrs. Lucas in January of 1972 were directed against her scheduled appearance before a federal grand jury investigating possible violations of federal statutes relating to interstate prostitution, narcotics and gambling. It is immaterial whether a state grand jury was contemporaneously investigating the possibility that there had also been violations of state statutes. It is likewise immaterial whether federal violations had in fact occurred. The gravamen of the charge is that a federal grand jury was investigating the possibility that such violations had occurred and that petitioner made threats in an endeavor to impede and obstruct that investigation. Petitioner admitted the existence of that investigation at trial (Tr. 465, 541) and again admits it in his petition for certiorari (Pet. 10).

Similarly, petitioner's threats against Mrs. Lucas on January 10, 1974, were connected with and occasioned by Agent Meek's interview of Mrs. Lucas two days previously and clearly related to her upcoming grand jury testimony. In July of 1973, Agent Meek had advised Mrs. Lucas that she might be called again by the grand jury

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[3]During 1972, a state grand jury was also investigating charges of prostitution and gambling in Charleston. Mrs. Lucas was subpoenaed to testify before the state grand jury, but the subpoena was quashed (Tr. 175-177).

to testify about petitioner. In January, 1974, a federal grand jury was in fact continuing the investigation of prostitution and corruption in Charleston, and Mrs. Lucas testified before that grand jury on January 17, 1974.

In sum, the government adequately demonstrated that petitioner's threats, both in January of 1972 and January of 1974, were directed against Mrs. Lucas' testifying before and cooperating with a federal grand jury investigating petitioner's connection with Charleston prostitution and gambling.

2. Petitioner contends (Pet. 11-15) that the trial court improperly admitted evidence of other crimes. It is settled law, however, that evidence of consistent prior conduct and related illegal acts are admissible to prove motive, knowledge and intent. See, *e.g.*, *United States* v. *Silvern*, 494 F.2d 355, 360 (C.A. 7). Particularly is this so in a prosecution under 18 U.S.C. 1503, for the jury should know the nature of the offense under investigation and the extent of the defendant's involvement in order to assess his motive in intimidating the witness. *United States* v. *Bradwell*, 388 F.2d 619 (C.A. 2), certiorari denied, 393 U.S. 867.

Here, in cross-examination of government witnesses and in his own testimony at trial, petitioner disavowed any connection with prostitution and gambling in Charleston and vigorously attacked the credibility of Mrs. Lucas. He denied all aspects of Mrs. Lucas' testimony regarding the January 1972 threat (Tr. 467, 469-472) and denied threatening her with the loss of her job or acting with any criminal intent during his January 1974 encounter with her (Tr. 492-494). Accordingly, evidence of petitioner's involvement with known prostitutes and gamblers was properly admitted by the court. Moreover, at the outset of trial (Tr. 26-27), following petitioner's cross-examination

(Tr. 603-604), and again in its charge to the jury (Tr. 707-708), the court clearly instructed the jury on the limited purpose for which such evidence could be considered.

Finally, we note that the bulk of the evidence specified by petitioner as inadmissible (Pet. 7)[4] was in fact admitted at trial without any objection in regard to relevancy, except for a broad objection to "evidence of some other alleged crimes involving Robert Crouse." This objection was made at the beginning of the trial and was coupled with a request that, if the objection were overruled, the court should give a cautionary instruction as to the limited purpose for which the evidence was received (Tr. 18-22). Petitioner then made it clear that he did not want the instruction repeated each time such evidence was admitted but preferred that it be given only at the conclusion of the trial (Tr. 22-26).[5]

3. Petitioner also claims that the prosecutor inserted into the trial misleading evidence regarding one Hobart Booth, to the effect that Booth, a friend of petitioner, had gone to Mrs. Lucas' office in January 1974 and told Mrs. Lucas not to talk to the F.B.I. However, the record reveals that petitioner's sole objection to Mrs. Lucas' testimony regarding Booth was sustained (Tr. 94-95). Thereafter, petitioner himself testified without

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[4]His listing of allegedly inadmissible evidence is not accompanied by any reference to the trial transcript.

[5]Such a limiting instruction was in fact given as a part of the general instructions at the conclusion of the trial. See Tr. 707-709.

objection that Booth said he had talked with Mrs. Lucas "as a friend" (Tr. 610). Moreover, the substance of Booth's grand jury testimony, which was favorable to petitioner, was presented to the jury during redirect examination of petitioner, over the government's objection (Tr. 609-611).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

DOJ-1975-03